DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-37/52413

PRELIMINARY RECITALS

Pursuant to a petition filed February 14, 2002, under Wis. Stat. §49.45(5), to review a decision by the Marathon County Dept. of Social Services to deny Medical Assistance (MA), a hearing was held on March 26, 2002, at Wausau, Wisconsin.

The issue for determination is whether the examiner may make an asset reallocation.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

(petitioner)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Sherri Seubert, ESS
Marathon County Dept. Of Human Services
400 E. Thomas Street
Wausau, WI 54403

ADMINISTRATIVE LAW JUDGE:
Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a nursing home resident of Marathon County. His wife resides in the community.

2. An application for nursing home MA was filed on petitioner's behalf on January 3, 2002. By a letter dated February 12, 2002, the county denied MA because assets were over the limit.

3. Petitioner receives $2,029.50 monthly retirement income. Petitioner's wife receives $659 in social security. The county set the community spouse income allocation at $1,935 because her shelter expense does not exceed $580.50.

4. Petitioner and his wife have $64,585 in assets. The county set the community spouse asset allocation at $50,000 and the asset limit at $52,000.

5. Included in petitioner's assets is an $8,000 cash value life insurance policy. No income from the policy is distributed; it is reinvested into the policy. Income received from the assets is $176 per month interest.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Wis. Stat. §49.455(1).

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Wis. Stat. §49.455(4)(a).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

The county determined that the current asset allowance for this couple is $50,000. See the MA Handbook, App. 23.4.2, which is based upon Wis. Stat. §49.455(6)(b) (if total assets are less than $100,000 the allowance is $50,000). $2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

As an exception to this general rule, assets above the allowance may be retained as determined through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the minimum monthly needs allowance. The minimum monthly maintenance needs allowance in this case is $1,935. MA Handbook, Appendix 23.6.0 (1-1-02).

Wis. Stat. §49.455(6)(b)3 explains this process, and subsection (8)(d) provides in its pertinent part as follows:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an amount to

> be used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted….

Based upon the above, a hearing examiner can override the mandated asset allowance by determining that assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant a hearing examiner the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied because the combined assets of the couple exceeded the spousal impoverishment asset limit.

In this case petitioner's income is $659 per month. Her husband's income of $2,029 provides more than enough for her to reach the $1,935 community spouse income allocation. Since the law says that the institutionalized spouse's income must be utilized first before the asset reallocation can occur, I must conclude that petitioner is not eligible for such a reallocation. Petitioner also asked for an income reallocation, but an income reallocation can occur only after the person is determined to be asset eligible for MA. See Wis. Stat., §49.455(4)(a).

Recently, due to a Wisconsin Court of Appeals decision, Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, the hearing examiner was required to allocate resources to maximize the community spouse's income before the institutionalized spouse's income could be utilized. The Court of Appeals ruled that the last sentence of §49.455(8)(d) was invalid. The Blumer decision was reversed by the United States Supreme Court on February 20, 2002 [citation numbers are not yet available]. With the reversal, the agency again must first add the total spouses' income to determine if asset reallocation is available.

There is another reason why petitioner's appeal could be dismissed. The life insurance policy does not distribute income. For an asset to be reallocated, it must produce income that can assist the community spouse. Current department policy provides the following treatment when income from such a policy is reinvested in the policy. If the owner of the policy has the option of having income distributed directly to him rather than be reinvested, then the income is considered available for the community spouse even if she chooses to have it reinvested. However, many such policies do not offer that choice; the income is reinvested automatically. Such policies cannot be reallocated to the community spouse. In this case it is unknown whether such a choice on income is available. If no choice were available, the $8,000 cash value would have to be counted against the asset limit even if all other assets were available to be reallocated to the community spouse.

CONCLUSIONS OF LAW

Because the couple's combined income is more than the $1,935 income allocation, the Division of Hearings and Appeals cannot reallocate assets to the community spouse.

NOW, THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 3rd day of April, 2002

/sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals
0402/bcs